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# In the Supreme Court of the United States

OCTOBER TERM, 1974

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No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC., PETITIONER

*v.*

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

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### INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

The question presented is whether it is a violation of federal or state antitrust laws for a union, acting in pursuit of its own interests and not in furtherance of a conspiracy with a non-labor group, to enter into an agreement with a general contractor, whose employees the union does not represent, that the contractor will subcontract construction site work only to persons who have a collective bargaining agreement with the union. Since the Board regulates such subcontracting agreements pursuant to Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), the Board has a substantial interest in the question, the resolution of which will have an impact on national labor policy concerning an important segment of the economy.

## STATEMENT

Connell is a general contractor in the construction industry in Texas (Pet. App. B-2). Connell's own employees are not members of, or represented by, respondent Union (Plumbers Local No. 100).[1] Connell contracts out the mechanical and plumbing work which is within the Union's jurisdiction, and it has, in the past, awarded such work equally to union and non-union subcontractors (Pet. App. B-3--B-4).

Early in 1971, the Union forced Connell, by peaceful picketing which caused a work stoppage at one of its projects, to enter into an agreement covering "mechanical work which the contractor does not perform with his own employees but uniformly subcontracts to other firms,"[2] and providing that, with respect to such work as is to be done "at the site of the construction," Connell would subcontract "only to firms that are parties to an executed, current, collective bargaining agreement with [the Union] * * * " (*id.* at B-2 n. 1, B-3).

Connell sued the Union, seeking a declaratory judgment that the agreement would violate the state and federal antitrust laws, and an injunction barring the Union from attempting to force Connell to enter into such an agreement (A. 25-34).[3] The amended complaint alleged that the agreement was unlawful because it restricted Connell's "right to contract or do business with firms or companies which do not have a binding collective bargaining agreement with the [Union] * * *" (A. 30).

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[1]Connell itself employs carpenters, cement finishers, iron workers, hoisting engineers, and laborers, and has collective bargaining agreements with the unions representing those crafts (A. 53).

[2]The agreement was aimed at future subcontracts, as the plumbing contractor on the picketed project had a collective bargaining agreement with the Union (Pet. App. B-3).

[3]Suit was originally filed in state court, alleging only a violation of the state antitrust laws (A. 3-17). The Union removed the case to the district court, which denied Connell's motion to remand (A. 35), and Connell amended the complaint to include a Sherman Act claim.

The district court concluded that the agreement was protected by the first proviso to Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e) (discussed, *infra*, pp. 7-9), and that therefore it did not violate the antitrust laws (Pet. App. A-5—A-7). The court of appeals (Judge Clark dissenting (Pet. App. B-49—B-65)) affirmed, but on different grounds (Pet. App. B-1—B-49), and denied rehearing (Pet. App. B-66—B-67). From its reading of *United Mine Workers* v. *Pennington,* 381 U.S. 657, and *Meat Cutters Union* v. *Jewel Tea Co.,* 381 U.S. 676, the court of appeals concluded that labor union activities are exempt from the antitrust laws unless (1) there is a "conspiracy between labor and non-labor groups to injure the business of another non-labor group," or (2) the union's agreement reaches beyond a "legitimate union interest" (Pet. App. B-21). The court found that Connell had failed to satisfy either ground for removing the exemption.

The court noted that there was "no allegation of this union's participation in a scheme or conspiracy with a non-labor group to create a monopoly for that non-labor group," nor does "the proof allude to any such conspiracy;" rather, Connell, "the sole non-labor party to the agreement," bases "its claim on the ground that this contract simply restricts the way in which it is free to carry out its business" (*id.* at B-23). Moreover, the subcontracting agreement serves a "legitimate union interest" since it tends "to eliminate any edge that a non-unionized subcontractor has in bidding on a job when that competitive edge rests solely or primarily on the fact that he pays less wages or grants lower working standards than a unionized subcontractor" (*id.* at B-29). Nor, in the court's view, would the legitimacy of the Union's interest for

purposes of the antitrust laws be impaired if, as Connell alleged, the agreement violated Section 8(e) of the National Labor Relations Act;[4] if "the goal sought or the methods used in attempting to reach that goal violate the ground rules for labor relations set forth in the NLRA * * * punishment must come through the procedures and in the manner specified by Congress in the labor laws" (*id.* at B-36).

Judge Clark, dissenting, concluded that the agreement was not protected by the first proviso to, and thus violated, Section 8(e) of the National Labor Relations Act (*id.* at B-59—B-65), and stated that "whenever a union crosses the line separating protected activities from prohibited activities it sheds its cloak of total antitrust immunity" (*id.* at B-58—B-59).

## DISCUSSION

1. In the instant case, the Union, through peaceful picketing, secured from Connell, a general contractor in the building and construction industry, a contract whereby Connell agreed not to subcontract plumbing and related work to be performed on construction sites except to firms that are party to a collective bargaining agreement with the Union. The court of appeals found, on the basis of substantial evidence, that the agreement was not the product of any conspiracy between labor and non-labor groups to create a monopoly for the latter, and that the Union was "simply seeking to eliminate competition based on differences in labor standards and wages" (Pet. App. B-28). On these findings the subcontracting agreement should be held, under the principles enunciated in

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[4]The court of appeals thus found it unnecessary to decide whether the agreement violated Section 8(e) or was protected by the first proviso thereto (Pet. App. B-39—B-47).

*Pennington* and *Jewel Tea,* to be within the labor exemption to Section 1 of the Sherman Act, 15 U.S.C. 1.[5] Connell, and those supporting it, contend, however, that a different conclusion is warranted here because, they say, the agreement violates Section 8(e) of the National Labor Relations Act. The court of appeals properly rejected this contention.

2(a). In 1932, Congress enacted the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101, to overrule the holdings in *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 469-478, and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Ass'n*, 274 U.S. 37, that Section 20 of the Clayton Act, 38 Stat. 738, immunized from the Sherman Act only trade union activities directed against an employer by his own employees. "Congress abolished, for purposes of labor immunity, the distinction between primary activity between the 'immediate disputants' and secondary activity in which the employer disputants and the members of the union do not stand 'in the proximate relation of employer and employee . . . .' * * *" *National Woodwork Manufacturers* v. *National Labor Relations Board,* 386 U.S. 612, 623; see also *United States* v. *Hutcheson,* 312 U.S. 219, 231. In

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[5]In *Pennington*, the Court reiterated that "the elimination of competition based on wages among the employers in the bargaining unit * * * is not the kind of restraint Congress intended the Sherman Act to proscribe." 381 U.S. at 664. But, it added, "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy." 381 U.S. at 665-666.

In *Jewel Tea*, the opinion of Mr. Justice White stated that "exemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws. * * * Thus the issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act. We think that it is." 381 U.S. at 689-690 (footnote omitted).

1947 and 1959, when Congress proscribed union activities that it considered detrimental to the public good, it rejected "attempts to restrict or eliminate the labor exemption from the antitrust laws * * *;" rather, it made "unlawful certain specific union activities under the National Labor Relations Act."[6] *Jewel Tea, supra,* 381 U.S. at 707-708 (opinion of Goldberg, J.).

For example, Congress "curbed the secondary boycott in § 8(b)(4)(B) of the National Labor Relations Act, preserving from condemnation certain secondary activities deemed legitimate. The jurisdictional strike is regulated by § 8(b)(4)(D) in conjunction with § 10(k) of the Act. * * * Strikes and pressure by minority unions for organization or recognition are controlled by §§ 8(b)(4)(C) and 8(b)(7) of the Act. Union restrictions on contracting out and subcontracting of work are delineated by § 8(e) of the Act.* * * [I]n enacting this last prohibition, Congress * * * specifically excepted the unusual situations existing in the garment and building industries." *Id.* at 708-709 (footnotes omitted).

Moreover, Congress not only carefully delineated the union activities that it desired to proscribe, but it carefully selected the sanctions to be applied against such activities. It rejected efforts to give private parties the right to seek injunctive relief, entrusting that power only to the National Labor Relations Board and its General Counsel. See 29 U.S.C. 160(j) and (*l*); *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183 (C.A. 4). While it authorized private parties injured by certain union secondary activities to sue for damages (Section 303 of the Labor Management Relations Act, 29 U.S.C. 187), it "limited [the recovery] to actual, compensatory damages." *Teamsters Local 20* v. *Morton,*

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[6]The pertinent legislative history is discussed in the brief of respondent Union (Resp. Br. 34-42).

377 U.S. 252, 260. Finally, as noted above, Congress specifically rejected proposals to subject the proscribed union activities to the antitrust laws and their sanctions.[7]

(b). Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void * * *.

The first proviso excepts from the ban of Section 8(e):

> an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work * * *.[8]

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[7]The Court's statement in *National Woodwork, supra,* 386 U.S. at 632, that "Congress, in enacting §8(b)(4)(A) of the [Taft Hartley] Act, returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co.* * * *," is not inconsistent with the foregoing analysis. A reading of the Court's opinion as a whole makes plain that it meant, not that Congress had restored antitrust sanctions for secondary boycott activity, but that it had subjected it to regulation under the National Labor Relations Act and the Labor Management Relations Act. See 386 U.S. at 623-644; *id.* at 652-663 (Stewart, J. dissenting).

[8]A second proviso excepts similar agreements in the apparel and clothing industry.

Section 8(b)(4)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(A), makes it an unfair labor practice for a labor organization to force an employer to enter into any agreement that is prohibited by Section 8(e). Accordingly, economic pressure to obtain an agreement barred by Section 8(e) would be unlawful, but such pressure to obtain an agreement protected by the construction industry proviso would not. Economic pressure to enforce the latter as well as the former type agreement would, however, violate Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B), which makes it an unfair labor practice for a labor organization to engage in economic pressure for an object of forcing a neutral employer to cease doing business with the employer with whom the labor organization has its primary dispute. See *Orange Belt District Council* v. *National Labor Relations Board,* 328 F. 2d 534, 537 (C. A. D.C.); *Construction Laborers Union, Local 383* v. *National Labor Relations Board,* 323 F. 2d 422, 425 (C. A. 9); *Essex County District Council of Carpenters* v. *National Labor Relations Board,* 332 F. 2d 636, 641 (C. A. 3); *Northeastern Indiana Bldg. Trades Council,* 148 NLRB 854, enforcement denied on other grounds, 352 F. 2d 696 (C.A. D.C.).

The agreement about which Connell complains, which limits the persons to whom it can subcontract plumbing and related work, is either prohibited by Section 8(e) of the National Labor Relations Act or protected by the construction industry proviso thereto.[9] If the former,

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[9]There is no question that Connell is "in the construction industry" and that the agreement which it entered into with the Union relates to "contracting or subcontracting of work to be done at the site of the construction." Accordingly, the agreement would clearly come within the first proviso to Section 8(e) (*supra*, p. 7), unless, as Connell contends, it is not an "employer" within the proviso because it neither has a collective bargaining relation with the Union nor employs any employees who perform work covered by the agreement.

the Board would have power only to seek a temporary injunction and to enter an appropriate remedial order. In addition, Connell could sue for actual damages under Section 303 of the Labor Management Relations Act. If, on the other hand, the agreement were protected by the construction industry proviso to Section 8(e), Connell would be entitled to no remedy under either statute.

(c) It is unnecessary to determine whether the agreement here violates Section 8(e) or is protected by the construction industry proviso thereto.[10] As the

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[10]The Board has not considered that question. But see *Joint Bd. of Garment Workers*, 212 NLRB No. 106, 86 LRRM 1651, 1653-1654 (Resp. Br. 26, n. 6). However, the General Counsel of the Board has refused to issue complaints on charges challenging the validity of subcontracting agreements obtained from general contractors who, like Connell, do not employ any employees represented by the union (Pet. Br. 9; Resp. Br. App. 1a-33a). The General Counsel's reasons are set forth in a public statement (*id.* at 2a-33a). The statement notes, *inter alia*, that "'Congress intended by means of Section 8(e) to preserve the status quo of bargaining in the construction industry * * *'" (*id.* at 32a, quoting *Dallas Building Trades Council* v. *National Labor Relations Board*, 396 F. 2d 677, 682 (C.A. D.C.)); that "organizing in the building and construction industry both prior to and subsequent to the 1959 amendments [to the Act], was and is primarily carried on by building and construction trades councils on behalf of their constituent craft locals" (*id.* at 31a); and that the "agreements proffered are not conventional collective-bargaining agreements, nor is a conventional collective-bargaining relationship sought, but rather an attempt is made to obtain skeleton agreements (containing little more than subcontracting provisions) which in turn are augmented by the execution of collective-bargaining agreements by the individual trade unions, the latter agreements containing provisions governing wages and other substantive conditions of employment" (*id.* at 31a-32a; footnote omitted).

court below correctly concluded, in either case the application of antitrust sanctions would upset Congress' judgment as to "how the balance of interest between labor and management is to be struck in the public interest" (Pet. App. B-34). "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests." *Local 1976, Carpenters* v. *National Labor Relations Board,* 357 U.S. 93, 99-100. This fact "counsels wariness in finding by [judicial] construction" *(id.* at 100) proscriptions or sanctions that Congress did not explicitly provide, and indeed deliberately rejected. See *National Woodwork, supra,* 386 U.S. at 619-620; *Morton, supra,* 377 U.S. at 259-260; *Suburban Tile Center, Inc.* v. *Rockford Bldg. Trades Council,* 354 F. 2d 1, (C.A. 7), certiorari denied, 384 U.S. 960.

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As an integral part of the statutory scheme for protecting the rights and duties conferred by the National Labor Relations Act, Congress gave the General Counsel "final authority, on behalf of the Board," to determine whether an unfair labor practice charge merits prosecution before the Board. Section 3(d), 29 U.S.C. 153(d). Where, as here, after investigation of the charge and analysis of the applicable Board and judicial precedents, the General Counsel concludes that there is not reasonable cause to believe that an unfair labor practice has been committed, and fully explains his refusal to proceed, his action defines "* * * 'the nature of the activity with unclouded legal significance.' " *Hanna Mining Co.* v. *District 2, Marine Engineers,* 382 U.S. 181, 191-192.

3. Finally, the test proposed by Connell and the dissenting judge below—which makes compatibility with the National Labor Relations Act the touchstone for determining the applicability of the Sherman Act to union activity—is unlikely to advance the goal of open competition which the latter statute is intended to promote.[11] Thus, under that test, the subcontracting agreement would have been lawful under the construction industry proviso to Section 8(e)—and hence lawful under the Sherman Act—if Connell had employed some employees performing work within the Union's jurisdiction. Yet the anticompetitive effects of the agreement in such a case would be substantially the same as they are where the general contractor does not employ such employees, *i.e.*, restriction of his ability to hire lower-priced non-union subcontractors, with resulting pressure on such subcontractors to unionize and give up their labor cost advantages (see Pet. App. B-32). The proposed test is not an appropriate basis for determining the applicability of the Sherman Act.[12]

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[11]Indeed, this Court has already recognized that the mere fact that union conduct may constitute an unfair labor practice under the National Labor Relations Act does not render it illegal under the Sherman Act. In *American Federation of Musicians* v. *Carroll*, 391 U.S. 99, in light of the district court's findings that "the orchestra leaders performed work and functions which actually or potentially affected the hours, wages, job security, and working conditions of petitioners' members" *(id.* at 106), the Court held that "it was lawful for petitioners to pressure the orchestra leaders to become union members, * * * to insist upon a closed shop, * * * [and] to refuse to bargain collectively with the leaders * * *." *Id.* at 106-107. The latter two actions would violate Section 8(b) (2) and (3) of the National Labor Relations Act, 29 U.S.C. 158(b)(2) and (3).

[12]If, as we have shown, the application of the Sherman Act here would be contrary to the regulatory scheme that Congress has fashioned in the National Labor Relations Act, it follows that the application of state antitrust laws would also be foreclosed. See *Teamsters Union* v. *Oliver*, 358 U.S. 283, 295-297.

## CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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